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Illinois Bell Telephone Company,	)	
Complainant,	)	
vs.	)	No. 01-0078
Commonwealth Edison Company,	)	
Respondent.	)	
Complaint regarding wrongful refusal to provide customer-specific customer transition charges	)	

COMMONWEALTH EDISON COMPANY'S REPLY BRIEF ON EXCEPTIONS
(REDACTED VERSION)

Commonwealth Edison Company ("ComEd"), by its attorneys, respectfully submits the following Reply Brief on Exceptions (the "Reply"). For the reasons stated in this Reply, ComEd respectfully submits that the Illinois Bell Telephone Company's ("IBT's") Exceptions (the "Exceptions") concerning the Administrative Law Judge's (the "ALJ's") Proposed Order (the "Proposed Order") are without merit, and that the Exceptions should be denied.

The Proposed Order correctly concludes that ComEd is not obligated to pay "reparations" to IBT. (Proposed Order, p. 13). It reaches this conclusion because the ALJ correctly found that IBT was required to continue taking bundled electric service under a contract that it had entered into with ComEd (the "Contract"). (Id.). IBT had sought reparations claiming that had it taken unbundled services at locations served under the Contract, ComEd should have provided it with "customer specific" "customer transition charges" ("CTCs") under

Rate CTC ("Rate CTC" or the "Rate"). The ALJ found, however, that because unbundled services were not available under the Contract, IBT's claims for reparations (which were premised on unbundled services being available) should be denied.

IBT takes three Exceptions to the ALJ's findings in the Proposed Order, each of which is incorrect. For the reasons stated in this Reply, the finding in the Proposed Order that the Contract required IBT to continue taking bundled electric service is correct based on the clear terms of the Contract itself, contrary to IBT's assertions. The Proposed Order's finding that the Contract has expired, and that IBT's request for "customer specific" CTCs in the future is therefore moot (Proposed Order, p. 14), is also correct, and is fully supported by the record. IBT's remaining criticisms of the Proposed Order are not well taken and should be denied.

I.

THE PROPOSED ORDER CORRECTLY FINDS THAT IBT COULD NOT TAKE UNBUNDLED SERVICES UNDER THE CONTRACT

IBT's first Exception challenges the Proposed Order's finding that it could not take unbundled service under the Contract. (IBT's Brief on Exceptions (the "IBT Brief"), pp. 2 - 11). IBT maintains that the Proposed Order errs for two reasons: (1) a plain language reading of the Contract demonstrates that delivery services are available; and (2) ComEd purportedly admitted that IBT could purchase delivery services under the Contract. Both challenges should be rejected as discussed more fully below.

A. IBT Has Not Demonstrated that Delivery Services Were Available To It Under the Contract

Section 1.3 of the Contract specifically provides the types of service available to IBT:

> **1.3 Charges and Terms.** (a) . . . [T]he customer will receive and pay for electric service under (i) this Contract, (ii) Rate 6 or 6L, as applicable, (iii) Rider 32, (iv) Riders No. 6, 7, 16, 20, 23, 25, 28 and 31, (v) Terms and Conditions, and (vi) any other applicable rates, riders or tariffs, in each case as the items in clauses (i) – (vi) are on file with the Illinois Commerce Commission from time to time and as the same may be added, deleted, modified or amended from time to time. . . .

(Contract, Joint Ex. 1, section 1.3(a) (parentheticals deleted). The ALJ correctly concluded that this section required IBT to take only ComEd's bundled electric service. (Proposed Order. p. 10). The Proposed Order reaches this conclusion because the Contract requires IBT to "receive and pay for electric service" under ComEd's bundled Rates 6 or 6L and Rider 32, which is available only to bundled service customers. (Contract, Joint Ex. 1, section 1.3(a); Rider 32, Joint Ex. 3, Sheet No. 95.09.6).

Having found that IBT must purchase service under Rates 6 and 6L and Rider 32, the ALJ correctly concluded that the term "other applicable rates, riders or tariffs" in the Contract could only apply to those rates, riders, or tariffs consistent with IBT's obligation to purchase bundled service. (Proposed Order, p. 11). This reading of the Contract incorporates all the subparts of Section 1.3, rather than isolating any single subpart as IBT desired. In other words, it correctly recognizes that the use of the conjunction "and" in Section 1.3 of the Contract immediately preceding the phrase other "applicable rates, riders, or tariffs" requires that the terms Rate 6, 6L, Rider 32 and "other applicable rates, riders or tariffs" be read together. It also recognizes that the "essential" purpose of the Contract was to provide IBT with bundled service

under Rates 6 and 6L and Rider 32, and that this purpose would be defeated if IBT became a delivery services customer. (Proposed Order, p. 11).

IBT disagrees with the Proposed Order's conclusion and advances several arguments in its Brief on Exceptions to support its position that the "plain language" of the Contract permits it to purchase unbundled services. (IBT Brief, Section 1(B), pp. 6-11). As articulated in Section 1(B) of its Brief on Exceptions, IBT claims that unbundled services could be purchased under the Contract because section 1.3 of the Contract allows IBT to purchase other "applicable rates, riders or tariffs." IBT argues that unbundled services such as Rate RCDS and Rider PPO are just such "other applicable rates, riders, or tariffs" available to it. (IBT Post-Hearing Brief, pp. 29-30). The Proposed Order properly rejected this argument. (Proposed Order, pp 10 – 11).

1. IBT's Speculative Argument Relating to the Parties' Purported Understanding Regarding Pending Legislation at the Time of Contract Negotiations Should Be Rejected

IBT first criticizes the ALJ's conclusion that other "applicable" services permitted under section 1.3 subpart (vi) must be "consistent" IBT's obligation to take bundled service under Rates 6 and 6L and under Rider 32 because those bundled service tariffs "existed when the Contract was created." (Proposed Order, p. 11). In contrast, Rate RCDS and Rider PPO did not exist at that time, and were filed later after the enactment Electric Service Customer Choice and Rate Relief Law (the "Rate Relief Law"). IBT argues that when the Contract was signed, ComEd must have "been aware" that delivery services were "on the horizon" because Illinois House Bill 0362 (which later was passed as the Rate Relief Law) had already undergone its "first reading" to the General Assembly. (IBT Brief, pp. 7 – 8). On this basis, IBT argues that other

"applicable" services permitted under section 1.3 of the Contract must have included the delivery services later permitted under the Law. (Id.).

IBT's argument is entirely speculative and should be rejected. Tellingly, IBT introduced no evidence into the record that when the Contract was entered into, there was an understanding that delivery services would be encompassed in the phrase other "applicable" services in section 1.3 of the Contract. In the absence of such testimony, IBT's claims about what the parties must have understood about the potential impact of pending legislative changes is speculation, and are not an appropriate basis for construing the Contract.

Moreover even if the parties somehow contemplated the future existence of delivery services (which they did not), Illinois law prohibits the consideration of extrinsic evidence of the parties' intent where, as here, the contract is unambiguous. Indeed, the very cases cited by IBT in its Brief on Exceptions support this proposition. As the court noted in Floor v. Schaffhausen Corporation, 49 Ill. App. 2d 97, 100 (3rd Dist. 1964) "[t]he intention of the parties to a contract must be determined from the language employed in the contract and, where there is no ambiguity, from such language alone. . . .Their intention is not to be determined from any surmises that they intended certain conditions which they failed to express, or, in general from some thought that existed merely in their minds." Thus under Illinois law, IBT's argument that the Contract must be interpreted in light of the parties' purported unexpressed understanding must be rejected.

2. The Proposed Order Correctly Found That IBT Could Not Purchase Delivery Services Under Section 1.3 of the Contract

IBT also argues that delivery services constitute other "applicable" services permitted under the Contract because section 1.3 provides that such services include ComEd's tariffs that are "added, deleted, modified or amended from time to time." (IBT Brief, p. 8

quoting (Contract, Joint Ex. 1, section 1.3(a)(vi)). However, not every new ComEd tariff falls within the scope of subpart (vi) of section 1.3, as the Proposed Order correctly finds. The section applies only to "applicable" tariffs that ComEd may file. (Id.). The Proposed Order correctly finds that these "applicable" tariffs under subpart (vi) are those that are "consistent" with IBT's obligation to continue taking bundled service, as provided for in subparts (ii) and (iii). (Proposed Order, p. 11). As delivery services are "incompatible" with this obligation, ComEd's tariff regarding delivery services cannot constitute an "applicable tariff" as the Proposed Order properly concludes. (Id).

Second, IBT criticizes the ALJ's conclusion that other "applicable" services permitted under Contract section 1.3 must be "consistent" with bundled service Rates 6 and 6L and Rider 32 because these bundled service tariffs were, in the ALJ's judgment, "essential" to the purposes of the Contract. (IBT Brief, pp. 8 – 9). IBT argues that if the bundled service tariffs were "essential," the Contract could have expressly required IBT to take bundled service, which IBT claims it does not. IBT thus contends that the ALJ has "rewritten" the Contract to contain a "bundled rate requirement." (IBT Brief, p. 9).

IBT's argument ignores the fact that delivery services were not available when the Contract was drafted. (ComEd Post-Hearing Brief, pp. 8 – 10). As a result, the Contract could not have contained an express requirement that IBT purchase bundled service because when the Contract was drafted, unbundled services did not exist. The absence of a provision expressly requiring IBT purchase bundled service therefore does not undermine the ALJ's conclusion that bundled service was an "essential" element of the Contract. Instead, using pre-Rate Relief Law terms, the Contract required IBT to take service under Rates 6 and 6L "and" under other

"applicable" tariffs. Those other "applicable" tariffs did not include Rate RCDS for all of the reasons stated herein.

3. The Contract's Inclusion of Rate 6(T) Locations Does Not Support IBT's Claim that Delivery Services Were Available to It Under the Contract

Finally, IBT notes that the Contract's list of locations identifies certain locations that took service under the "time of day" provisions of Rate 6, that are often referred to as Rate 6T provisions. (IBT Brief, p. 10 citing Contract, Joint Ex. 1, Ex. A). The Proposed Order notes that Rate 6T is not in the record, but concludes (correctly) that it is a "bundled service tariff" (Proposed Order, p. 11, n. 15), which is consistent with its finding that the Contract required IBT to take bundled service. IBT criticizes this finding as a "speculative assumption" about the content of ComEd tariffs that are not in the record. IBT's argument should be rejected for two reasons.

First, the Administrative Law Judge may take administrative notice of Rate 6T in accordance with the Commission's Rules of Practice. Section 200.640(a)(3) expressly provides that an ALJ may take administrative notice of approved tariffs filed with the Commission. 83 Ill. Admin. Code 200.640(a)(3). An examination of ComEd's Rate 6T tariff on file with the Commission establishes that Rate 6T refers to the "time of day" provisions that Rate 6 contains. (Rate 6, General Service, ILL. C.C. No. 4, 36th Revised Sheet No. 24) (on file with the Commission). Thus, Rate 6(T), as part of Rate 6, is a bundled service tariff.

Second, the record supports the finding that Rate 6T is a bundled service tariff. ComEd witness John Leick testified that he prepared tables showing what IBT paid as a ComEd "bundled rate" customer compared to what it would have paid had it taken delivery services. (Leick Testimony, ComEd Ex. 2.0, p. 5). Rate 6T is one of the "bundled rates" identified in the

tables Mr. Leick prepared. (Leick Testimony, ComEd Ex. 2.0, Exs. 1 & 2 thereto). In sum, the record establishes that the "Rate 6T" service referred to in the Contract was a bundled service provided under Rate 6, which is consistent with the Contract's requirement that IBT take only bundled service from ComEd.

B. ComEd did not Admit that IBT Could take Unbundled Services under the Contract

IBT contends in section 1(A) of its Brief on Exceptions that ComEd admitted that IBT could take unbundled services under the Contract in a letter dated November 3, 1999 (the "November 3, 1999 Letter" or the "Letter"). (IBT Brief, pp. 3 – 4 quoting Joint Ex 5). It claims that the Contract should be construed consistently with this purported admission. (IBT Brief, pp. 3 – 5).

The Letter does not contain any such admission. It discusses the types of CTCs that would apply to IBT's locations that received service under the Contract (Joint Ex. 5), but this is not an admission that the Contract permitted IBT to receive unbundled services. The Letter discusses, for example, the possibility that IBT could receive "customer specific" CTCs for locations that had "electric demands" in excess of "3,000 kilowatts" under Rate CTC. (Id.). This would occur if IBT elected to "delete" such locations from the Contract and take delivery services, in which event these locations would qualify for "customer specific" CTCs because of their size. (Rate CTC, Joint Ex. 2, p. 137). This portion of the Letter does not assume that "customer specific" CTCs would be provided to IBT if it continued to take service under the Contract.

IBT points to portions of ComEd's Answer which state that IBT had received delivery services at certain Contract locations. (IBT Brief, p. 5). This would occur if large locations were removed from the Contract and independently qualified for "customer specific"

CTCs in the manner discussed above. It does not suggest that IBT could take delivery services under the Contract.

The Letter also discusses the possibility that IBT could receive "class" CTCs at Contract locations with demand levels of less than 3,000 kilowatts. (Joint Ex. 5). This could occur if IBT terminated the Contract and elected to take delivery services at the Contract locations. If that were to occur IBT's locations with demand levels of less than 3,000 kW would receive "class" CTCs under Rate CTC, because they would not qualify for the "customer specific" CTCs available to locations with demand levels that exceeded 3,000 kW. (Rate CTC, Joint Exs. 2, p. 137).

IBT claims that the Contract should be interpreted in light of ComEd's purported construction placed on it in the November 3, 1999 Letter, and cites cases like Farmers Bank v. Schulte, 241 Ill. App. 3d 90 (5th Dist. 1993) in support of this proposition. (IBT Brief, p. 3). The November 3, 1999 Letter did not provide evidence of any construction placed on it by the parties for the reasons discussed above.

Moreover, IBT's argument fails as a matter of law. IBT cites several Illinois cases to support its proposition that a "contract should be interpreted consistent with the construction placed on it by the parties prior to the time a dispute arose." IBT Brief at 3. IBT fails to state, however, that the cases it cites apply only where a contract is found to be ambiguous. See, e.g., Lima Lake Drainage Dist. v. Hunt Drainage Dist., 204 Ill. App. 3d 521, 525-26 (3d Dist. 1990) (observing that in construing an ambiguous contract, the court must look to the intent of the parties evidenced by the facts and circumstances surrounding the making of the contract); Reed v. Holder, 200 Ill. App. 3d 1052, 1054 (5th Dist. 1990) (noting that parol evidence is inadmissible to vary or contradict the clear written provisions of an integrated

contract); Vole, Inc. v. Georgacopoulos, 181 Ill. App. 3d 1012, 1021 (2d Dist 1989) (noting that only when a contract is ambiguous may a court consider the contemporaneous or subsequent acts of the parties to the contract). Thus, even if the Letter contained the construction claimed by IBT, it still must not be considered because, "absent ambiguity," the meaning of a contract is to be determined by its terms, "and not by the construction placed on it by the parties." J.B. Esker v. CLE-PA's Partnership, 325 Ill. App. 3d 276, 285, 757 N.E.2d 1271, 1279 (5th Dist. 2001) (citing American Nat'l v. Kentucky Fried Chicken of Southern California, 308 Ill. App. 3d 106, 719 N.E.2d 201, 210 (1st Dist. 1999)). The Contract contains no ambiguity, and reference to any purported construction placed on it is therefore improper.

II.

THE PROPOSED ORDER CORRECTLY FINDS THAT IBT IS NOT ENTITLED TO FUTURE "CUSTOMER SPECIFIC" CTCS BECAUSE THE CONTRACT HAS EXPIRED

IBT's second Exception contests the Proposed Order's finding that the Contract has expired and that IBT's request for "customer specific" CTCs in the future is therefore moot. (IBT Brief, pp. 11 – 14). This Exception is also incorrect.

The expiration of the Contract term turns on section 1.2, which states, in relevant part:

> 1.2 **Contract term**. Electric service under this Contract will commence on . . . the first business day ("Effective Date") after this Contract has been approved by the . . . Commission. . . . Electric service under this Contract shall expire on . . . the December 31 following the fifth anniversary of the Effective Date; provided that, unless this Contract has been . . . terminated, this Contract shall, upon the expiration, . . . automatically be renewed for a period of twelve months unless either [party] notif[ies] [the other] of the termination . . . at least thirty days in advance of the termination date.

(Contract, Joint Ex. 1, section 1.2). The Commission approved the Contract in 1997 (Contract, Joint Ex. 1, p. 1), providing for a 1997 "Effective Date." The Contract would thus terminate on "the December 31 following the fifth anniversary of the Effective Date" (i.e., on December 31, 2002) unless it were to be automatically renewed pursuant to this Contract section.

IBT criticizes the Proposed Order's finding that the Contract expired on December 31, 2002 (Proposed Order, p. 3), because it claims that the record does not reflect whether the Contract term was automatically renewed. (IBT Brief, p. 12). However, after criticizing the Proposed Order on this basis, IBT acknowledges in its Brief that the Proposed Order's finding is correct. IBT later admits that after the record in this case was closed, ComEd notified IBT that the Contract would not be renewed. (IBT Brief, p. 12). As a result even IBT agrees that the Contract expired on December 31, 2002. IBT's quibbles about whether there is proper record support for this finding are therefore immaterial.

IBT also criticizes the ALJ's finding that its request for future "customer specific" CTCs is moot given the expiration of the Contract. (IBT Brief, pp. 12 - 14). It notes that ComEd witness Crumrine testified that it was ComEd's intent in drafting Rate CTC to provide "customer specific" CTCs upon the "appropriate termination" of contracts that contained discounts from base rates. (IBT Brief, p. 13 quoting Crumrine Testimony, ComEd Ex. 4.0, p. 6). Mr. Crumrine's testimony is based on ComEd's Policy concerning the implementation of Rate CTC, which states that

(ComEd Policy, Geraghty Testimony, ComEd Ex. 3.0, Ex. D thereto, p. CE 1623) (confidential).

For IBT to base an argument on ComEd's Policy is, in the language of the Proposed Order, "ironic." Throughout this proceeding, IBT has argued vehemently that the

Commission should disregard ComEd's Policy. IBT has argued at various times that the Policy is irrelevant and that it violates the filed rate doctrine and the Public Utilities Act, among other claims (E.g., IBT Post-Hearing Brief, pp. 17-18). IBT apparently is ready to live with all of these results when it finds a portion of the Policy that it likes.

IBT cannot choose to rely on only the advantageous portions of the Policy, while disregarding the rest. IBT has successfully argued that ComEd's Policy should not be considered in determining whether the Contract is a "customer specific electric service contract." (Proposed Order, pp. 5 – 8). It should not now be heard to argue that other portions of the Policy should be followed. In fact, it's estopped from doing so under Illinois law by the doctrine of judicial estoppel, which prevents a party from prevailing on a position in litigation, and then seeking to prevail on the opposite position. McDonald's Corp. v. American Motorists Ins. Co., 321 Ill. App. 3d 972, 986-87, 748 N.E.2d 771, 783 (2d Dist. 2001); see also Pegram v. Herdrich, 530 U.S. 211, 228 n. 8 (2000) ("[j]udicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.").

Similarly, IBT urged the ALJ throughout this proceeding to apply Rate CTC according to its "plain language" and without resort to the Policy. (IBT Post-Hearing Brief, p. 17). The ALJ has accepted IBT's position. The Proposed Order finds that under the "plain language" of Rate CTC, "customer specific" CTCs are not available based on a "customer specific electric service contract" that has expired. The Proposed Order's conclusion is supported by section 9-250 of the Public Utilities Act, as discussed therein. (Proposed Order, p. 13). It is also consistent with the position advocated by IBT.

Finally, in order to provide "customer specific" CTCs going forward, the ALJ would need to determine the proper number of Contract locations that would receive such CTCs. There is a substantial dispute concerning this issue, with IBT claiming that 126 locations are covered by the Contract, and ComEd claiming that there are only 51 Contract locations. (ComEd Post-Hearing Brief, pp. 37 – 42). IBT's Brief on Exceptions provides the ALJ with no guidance on this issue, and its suggested revisions to the Proposed Order simply assume that it would prevail on this issue and that 126 locations would receive "customer specific" CTCs. If "customer specific" CTCs are provided on a going forward basis, they should only be provided to the 51 locations identified by ComEd. (Voller Testimony, ComEd Ex. 1.0, p. 4 and Att. 2). ComEd hereby incorporates the arguments in support of this position made in is Post-Hearing Brief by reference. (ComEd Post-Hearing Brief, pp. 37-42).

III.

THE PROPOSED ORDER CORRECTLY REJECTS IBT'S CLAIM FOR REPARATIONS

IBT's final Exception is based on a provision in Rate CTC which states:

> Any retail customer for which customer-specific CTCs are calculated must enter into a contract with the Company that sets forth the CTCs to be paid and conditions of CTC payments.

(Rate CTC, Joint Ex. 2, Sheet No. 137). IBT claims that because its Contract was a "customer specific electric service contract," ComEd should have provided it with a contract pursuant to this provision. (IBT Brief, pp. 15 – 16). IBT seeks reparations because ComEd did not provide such a contract in November, 1999, when IBT initially requested "customer specific" CTCs. (Id.).

This theory is incorrect. Initially, during the term of the Contract, IBT could not have obtained any benefit from the type of contract contemplated by this tariff provision. That is

because the Contract required IBT to continue taking bundled service, and, therefore prevented IBT from receiving either "class" or "customer specific" CTCs, which pertain only to delivery services. (Proposed Order, p. 13). As a result, IBT would have received no benefit from a contract specifying its "customer specific" CTCs because these CTCs simply did not apply to the bundled service it was required to take during the Contract term.

In the alternative, IBT could have elected in November 1999 to terminate the Contract and to receive delivery services at the Contract locations and to seek "customer specific" CTCs in connection with that service. In that situation, ComEd could have issued IBT a contract of the type referred to above that specified the applicable "customer specific" CTC amounts, However, even if this were to have occurred, IBT still would not be entitled to reparations. That is because the sum of the termination payments that IBT would have been required to make, and the curtailment credits that IBT would not have received had it terminated, were far in excess of any savings that IBT would have received with "customer specific" CTCs. (ComEd Post-Hearing Brief, pp. 42-46; Leick Testimony, ComEd Ex. 2.0, pp. 12-14).

ComEd performed detailed calculations which demonstrated that IBT would have received no benefit from receiving delivery services with "customer specific" CTCs beginning in December, 1999. These calculations showed that if the correct number of 51 Contract locations is considered, IBT would have "saved" $251,867 if it would have received delivery services with customer specific CTCs beginning at that time instead of ComEd's bundled service. These "savings" would have been far outweighed by the termination payments that IBT would have been required to make to ComEd, and the curtailment credits it would have missed had it terminated, which totaled $847,520. (ComEd Post-Hearing Brief, pp. 6 & 42-47). The same is

true if IBT's 126 purported Contract locations are considered. In that case, IBT's "savings" rise to $603,558, but are still eclipsed by the $847,520 in termination payments that IBT would have been required to make to ComEd and missed curtailment credits that would have resulted if IBT terminated. (Id.).

The bottom line is that "customer specific" CTCs would not have saved IBT any money. The same is true for a contract specifying these CTCs that is the subject of this Exception. No reparations should therefore be allowed.

IV.

CONCLUSION

WHEREFORE, for all of the reasons stated herein, ComEd respectfully submits that IBT's Exceptions to the Proposed Order are incorrect, and that they should therefore be denied.

Dated: April 15, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert C. Feldmeier, do hereby certify that a copy of the foregoing Commonwealth Edison Company's Reply Brief on Exceptions (Redacted Version) was served upon all parties on the attached Service List by electronic mail and by deposit in the United States Mail, first class postage prepaid, at 321 N. Clark St., Chicago, Illinois 60610, on April 15, 2003.

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